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ABSTRACT

This paper examines the legal questions involved in public financial support and resulting public control of private schools in both Canada and the U.S. Three factors are responsible for increased public interest in private schools in recent years, the paper states: increased educational costs, concern over the concept of equal education, and competition between public and private schools for students. The paper discusses and compares private school enrollment figures in Canada and the U.S., the legal frameworks within which their educational institutions operate, and legal issues relating to public funding and public control of their private schools. The paper concludes that private schools in North America are becoming increasingly dependent on public funds to assist in their financial operations. They are also becoming increasingly subject to controls established by government and, as a result, the issue of their survival is at stake. (Author/LD)

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PUBLIC FUNDING AND CONTROL OF PRIVATE SCHOOLS
CANADIAN - U.S. COMPARISONS

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The fact that the private schools in North America have been the subject of increasing public discussion recently represents a major change in interest in this area. For many decades the private schools tended to be virtually ignored by the public and by governmental agencies. John Porter, in 1965, expressed the then prevailing Canadian attitude towards them in this way:

> In the image of middle class equality that Canadians have of their society, the private school does not belong. It is something associated with the aristocratic societies of Europe, and is rarely even thought of as being a significant feature of Canadian life.[1]

This general public indifference to the operations of private schools tended to be carried over into official policies toward their existence. As Hagen noted in reference to the United States situation, "From the beginning, public policy has dictated that the state assume a hands-off attitude towards private education, and this has endured in large part, even until today."[2]

Three factors are principally responsible for the increasing public interest in private schools that has become evident in recent years. The first, greatly increasing educational costs due to inflation and other reasons, has forced many private schools and their supporters to initiate vigorous campaigns to secure public funds to assist in the financing of their operations. This has also been the factor that has led legislators in both countries to face questions regarding the ability of private schools to offer satisfactory programs for their students sometimes with only a fraction of the financial resources that are available to their public school counterparts.[3] The second major factor is related to the increasing public concern over the concept of equality of educational opportunity. This

concern has induced legislators and the judiciary to attempt to reduce apparent educational inequities whether they have derived from factors associated with race, geography, economic background, or private school attendance. The third major factor relates to the recent phenomenon of rapidly declining enrolments throughout most of Canada and the United States. The competition for students between the public and private schools has brought the affairs of the latter into broader public focus.

Two important issues relating to the operations of the private schools at the present time concern questions of financial support and of public controls over their operations. In both Canada and the United States ways and means are being explored or implemented to supplement the traditional forms of private school funding (mainly tuition fees and contributions from religious organizations) with various types of direct and indirect public financial assistance. At the same time legislatures and their administrative agencies are bringing into effect a number of policies and regulations which have the effect of limiting the ability of private schools to determine for themselves the kinds and quality of educational experiences that they provide for their students.

These dual issues of public financial support and public controls of private schools raise interesting questions in both Canada and the United States. It is the purpose of this paper to examine these questions in the light of the differing legal contexts in which private schools operate within the two countries.

THE EXTENT OF PRIVATE SCHOOL OPERATIONS IN CANADA AND THE UNITED STATES

In many population comparisons, Canadian statistics tend to approximate ten percent of United States figures. Thus Canada's population of 23 million compares with the U.S. population of 220 million. Total school enrolments in Canada number 5.0 million compared with approximately 50 million in the United States. However, in 1975-76 the private schools in the United States enrolled 4.5 million students, 9.1 per cent of the total enrolments in that country. In the same year Canadian private schools enrolled only 182,000 students, or 3.1 per cent of total school enrolments. Thus enrolments in private schools in Canada are proportionately fewer than would be expected from normal population comparisons.

The relative difference in private school enrolments between Canada and the United States can probably be explained at least in part by the existence of the separate school systems in the provinces of Alberta, Saskatchewan and Ontario, by the denominational school systems of Quebec and Newfoundland, and by the "gentleman's agreement" arrangements that have been developed in certain other Canadian provinces, all of which have provided accommodations to the religious preferences of some parents with respect to their children's education.[4]

Private school enrolments vary considerably from state to state and from province to province. They range from nearly twenty per cent of total enrolments in such states as Rhode Island, New York and Pennsylvania to under three per cent in Oklahoma, Utah and Alaska. In Canada they range from 6.5 per cent in Quebec to nil in Prince Edward Island.

Enrolments in the private schools in the United States have tended to fluctuate considerably over the years. In the middle of the last decade total private school enrolments numbered nearly 7 million, accounting for 14.3 per cent of the total elementary and secondary school populations in 1965-66. Five years later these figures had dropped to 5.6 million and 11.1 per cent. The fluctuations in enrolment in Canada's private schools have been less dramatic. In 1966-67, these totalled 189,000 declining slightly to 182,000 ten years later. In both countries the composition of private school enrolments has changed during this period, with the Roman Catholic schools suffering significant enrolment declines, while other religious and nondenominational schools have generally shown increases.[5]

THE LEGAL CONTEXT OF PRIVATE SCHOOL OPERATIONS: CANADIAN - U.S. COMPARISONS

The legal frameworks within which educational institutions operate in Canada and the United States have certain features that are similar, and other features that make for major differences. In Canada the constitutional allocation of powers provided for in the British North America Act specifically give to the provincial legislatures exclusive authority to make laws in relation to education.[6] In the United States educational responsibilities are not mentioned in the constitution, but are, through the provisions of the Tenth Amendment,[7] considered to be within the jurisdiction of the states.

In Canada, the authority of provincial legislatures in educational affairs appears to be absolute, except for those provisions in Section 93 of the B.N.A. Act which limit their power to "prejudicially affect"

denominational rights which were present in a province at the time it entered confederation. There seems to be no question of the authority of provincial legislatures to regulate the affairs of both public and private educational institutions within their jurisdictions.

In the United States, the authority of state governments to control education are circumscribed to a greater extent than is the case in Canada. Primarily this comparative reduction in the legislative authority of state governments is due to the provisions of the First and Fourteenth Amendments of the U. S. Constitution. These have particular implications for the private schools. Since the majority of these schools in the United States (as is the case in Canada) have religious connections, the First Amendment, through its clause proscribing the "establishment of religion", would appear to bar public financial support to private religious schools in any form. Similarly, the Fourteenth Amendment, which prohibits states from making or enforcing laws which "abridge the privileges or immunities of citizens" would seem to limit the authority of states to interfere with established rights of the supporters of private schools.

Certain provisions of some state constitutions are even more explicit in their intent to separate the affairs of schurch and state in educational matters. The New York state constitution, for example, has a provision which expressly forbids state funds from being employed in church-affiliated schools.[8]

However, despite these apparent legal impediments to the authority of state legislatures to intervene in private school affairs, much as been done

in many U.S. states in matters relating to both state support and state control of such schools.

ISSUES RELATING TO PUBLIC FUNDING OF PRIVATE SCHOOLS

In Canada during recent years provincial legislation has provided for public assistance to private schools in a variety of ways. This assistance has progressed from relatively indirect forms initially to the current situation where direct grants are available to qualifying private schools in most provinces. At first, the assistance to private schools was typically in the form of "shared services" arrangements, where particular services and facilities operated by public school authorities for their own students were made available for the use of private school pupils and teachers when such use was not disruptive of public school operations. Later, legislation authorized the private schools to make free use of textbooks, reference books and certain other services provided by provincial authorities to the public schools. More recently, legislation has provided for direct grants to private schools, which now may amount to substantial sums.[9]

Other forms of direct and indirect financial assistance are available in Canada for private schools and their supporters. Educational and religious institutions generally are exempt from property taxation. For those private schools with religious connections, provision can be made to have all or most of parental contributions for the school programs categorized as charitable contributions and thus exempt from income taxes. Tuition fees paid by a student, where applicable, are deductible for income tax purposes.

Private schools, like other educational institutions, may claim exemption from sales tax on certain items used for educational purposes. In addition, the private schools appear to be as eligible for grants from federal government sources, in support of such things as second language programs and travel opportunities for students, as are the public schools.

There seems to be no question as to the legality of these various forms of financial assistance to private schools in Canada. The issues raised tend to be political rather than legal, with considerable debate often centering around the appropirateness of such financial assistance ("How can you justify implementing or increasing public assistance to private schools when the public schools are in such financial straits?") and the methodology employed in distributing such support.[10]

The situation with respect to public financial support for private schools in the United States at the present time appears to be in a state of flux. Advocates of such support claim an almost total lack of such assistance, while the vocal opponents cling tenaciously to First Amendment arguments in their efforts to retain the "wall that separates church and state" intact. In actual fact, as Kraushaar points out, "the issue of state aid has never been, in the United States, a question of whether the state shall or shall not aid non-public schools; it is in most states a question of how and how much."[11] Support programs now operating in many states include transportation of students, the provision of textbooks and other educational resources, and the use of such state financed services as psychological testing and remediation programs. In addition these schools and their supporters

enjoy exemption from certain state and federal taxes, and progress is being made to make such federal funds as those in Titles I, II and III of the Elementary and Secondary Education Act (ESEA) appropriations available to the private schools.

The process of invalidating such support programs initiated by state and federal governments in the United States is through challenges in the courts as to their constitutional validity, based upon the First Amendment and, where applicable, state constitution provisions, which are initiated by opponents of such programs. The supporters of such legislation attempt to rebut these with three major counterarguments. The first is based upon the contention that the private schools expend most of their energies on academic programs similar to those provided in the public schools and should for reasons of equity receive compensation for performing this important public function. The second involves issues of equality of educational opportunity, and has three major points: (a) attendance at private schools is a legally valid option of parents; (b) state congresses are imposing a variety of controls over these schools to ensure that their students achieve an education of acceptable standards; therefore, (c) the state should provide the necessary supplemental resources to meet such standards when parents elect the option of sending their children to these schools. The third argument is the contention that such assistance is in aid of students, not private schools as such.

Recent United States Supreme Court decisions illustrate the rather confused state of affairs in regards to this question. A recent Ohio

statute provided nonpublic school pupils with textbooks, standardized testing and scoring materials, therapeutic services, instructional materials and equipment, and field trip transportation. This statute was challenged and was eventually ruled upon by the U.S. Supreme Court. Several of these provisions were held to be legal, although the instructional materials and field trip sections of the law were struck down, "in a series of shifting majority rulings".[12]

The principle of state aid to private schools has been established de facto in the United States as it has in Canada. At present, this aid takes the form of indirect assistance, in most instances. The Canadian experience would suggest that a gradual progression to more direct forms of public involvement in the financial affairs to private schools can be anticipated in the future.

ISSUES RELATING TO PUBLIC CONTROL OF PRIVATE SCHOOLS

The authority of governments to involve themselves in the private sector affairs of a nation may derive from a variety of sources: traditional practice, specific provisions of a nation's constitution, for reasons considered to be "in the public interest", or, where public resources are being allocated, for reasons of accountability. Each of the above elements may be relevant in questions of public control of private schools in different parts of Canada and the United States. Generally, it would appear that the public interest doctrine and issues related to the accountability of public resources applied to private education have become of crucial importance in this regard during recent years.

Governments may apply their controls of private schools in many areas. The requirements for sanitation in the schools and for health and safety of children are as likely to apply to private schools as to any public or other private institution. All the provinces and states have compulsory education statutes which specify an age span during which children must attend school. This requirement can ordinarily be met through attendance in the private schools, but many jurisdictions specify conditions to make such attendance legal. These conditions may be stated in very general terms, such as in the form of a requirement that private school programs be equivalent to those available in the public schools; or they may be in the form of standards relating to teacher qualifications, programs and course content. In some instances, accreditation agencies are established to which private schools may submit themselves for accreditation documentation; in other instances, formal inspection procedures by government officials are mandated to determine the extent to which the schools adhere to the general or specific conditions stipulated. In certain areas, such documentation as budgets and attendance records must be made available for official scrutiny. Private school students in many cases must meet provincial or state specified requirements to obtain official graduation documentation.

In Canada, private schools wishing to invalidate a particular statutary provision which they feel to be excessively onerous usually have to rely on technical arguments, since courts are unwilling to question the competence of provincial legislatures in educational matters because of the explicit

wording of Section 93 of the B.N.A. Act. A recent Alberta case is illustrative of a challenge to provincial jurisdiction in this area. In this instance the parents of children attending the Kneehills Christian School, a rural private school operated by adherents of the fundamentalist Church of God in Christ (Holdeman) section of the Mennonite faith, were charged with failure to meet provincial compulsory school attendance requirements because the school's teachers lacked the prescribed provincial certification qualifications. The Alberta court dismissed the case because of inconsistencies viewed by the court between the certification provision of the Public Schools' Act and certain freedom of religion provisions in the province's human rights legislation.[13]

There are numerous instances of judicial review of private school controls in the United States. Elson, in an analysis of these cases, concluded that, "federal and most state courts will invalidate a state statute on an educational matter only if, without justification, it seriously infringes on a right guaranteed by the Fourteenth Amendment".[14]

The proliferation of legislation affecting private schools places increasing responsibilities upon state and provincial departments of education and their officials to carry out legislative intentions. When a statute's provisions are reasonably specific, such as when textbooks from an authorized list only are permissible, few problems may be anticipated in the administration of that statute. However, when the statute is less specific, as when private school programs are directed to be "equivalent" to those in the public schools, a great deal of

administrative discretion is necessary in arriving at such assessments. Such expansion of administrative discretion provides many possibilities for conflicts between public and private school officials which may lead in the future to the increasing intervention of the courts to settle disputes.

A further issue in this area concerns situations where local school system officials become involved in the administration of legislation affecting the private schools. In many instances, for example, local authorities are responsible for administering compulsory attendance legislation, which of necessity involves them with the attendance policies and records of private schools. In those jurisdictions where such attendance is legal only when the programs are "equivalent" to those in the public schools, local authorities could conceivably become directly involved in the assessment of private school programs.

The increasing body of legislation affecting the affairs of private schools and the intrusion of public school officials into their operations have serious implications for the future of private education in Canada and the United States.

CONCLUSION

The private schools in North America are becoming increasingly dependent upon public funds to assist in their financial operations, and they are beoming increasingly subject to controls established by governments. While it is possible to consider these two trends separately, it

is obvious that they are interrelated: as the public becomes more involved in private school funding, public controls become more pervasive.

What is at stake, perhaps, is the issue of survival of the private schools on this continent. On the one hand, the advocates of state aid claim that private schools must expand their traditional sources of revenue in order to continue to operate, and legislatures in Canada and the United States are becoming increasingly receptive to their pleas for public funding. On the other hand, as this public financing increases, public controls are established to the point where it becomes difficult to identify differences between public and private schools.

Notes

1. John Porter, The Vertical Mosaid: An Analysis of Social Class and Power in Canada. Toronto: The University of Toronto Press, 1965, p.284.

2. John C. Hagen, The Schools, the Courts and the Public Interest. Lexington, Mass: Lexington Books, 1974, p.161.

3. See: Daniel J. Sullivan, Public Aid to Private Schools. Lexington, Mass.: Lexington Books, 1974, p. 127.

4. See: F. Henry Johnson, A Brief History of Canadian Education. Toronto: McGraw Hill, 1968; Charles E. Phillips, The Development of Education in Canada. Toronto: W. J. Gage, 1957; and J. Donald Wilson, Robert M. Stamp and Louis-Philippe Audet (eds.), Canadian Education: A History. Scarborough, Ont.: Prentice-Hall of Canada Ltd., 1970.

5. Richard L. Nault, Donald A. Erickson and Bruce S. Cooper, "Hard Times for Nonpublic Schools, "The National Elementary Principal, 56, 16-21 July-Aug., 1977.

6. The British North America Act, Sec. 93.

7. The Tenth Amendment of the United States Constitution states, "The powers not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

8. Otto F. Kraushaar, American Nonpublic Schools: Patterns of Diversity. Baltimore: The John Hopkins University Press, 1972, p. 290-1.

9. In Alberta in 1977 annual per pupil grants to private schools ranged from $469 for students in Grade I-VI, $515 for students in Grades VII-IX, to $610 for pupils in Grade X - XII.

10. In Manitoba, grants from the provincial department of education for the support of private schools are forwarded to the public school authorities in whose geographic area the private schools are located. These authorities in turn are required to send these funds to the private schools.

11. Kraushaar, op.cit., p. 290.

12. See: Thomas J. Flygare, "Schools and the Law: Finally a Partial Victory for Parochial Schools," Phi Delta Kappan, 59: 51-3, Sept., 1977.

13. "Alberta Mennonites Force Test Case", Winnipeg Free Press, Jan.9, 1978, pp.1, 4.

14. John Elson, "State Regulation of Nonpublic Schools," Ch.5 in: Donald A. Erickson (ed.), Public Controls for Nonpublic Schools. Chicago: The University of Chicago Press, 1969, p.112.